TAMAN SUNGAI DUA DEVELOPMENT SDN BHD

v.

GOH BOON KIM

COURT OF APPEAL, KUALA LUMPUR
MAHADEV SHANKAR JCA
ABU MANSOR ALI JCA
ABDUL MALEK AHMAD J
[CIVIL APPEAL NO: W-02-453-1995]
9 OCTOBER 1995

COMPANY LAW: *Winding-up - Provisional liquidator - Appointed by Court - Appeal by company against appointment of provisional liquidator - Application by company to stay powers and duties of provisional liquidator pending appeal - Whether application for stay properly before Court after appointment of provisional liquidator - Companies Act 1965 s. 226(3)*

COMPANY LAW: *Directors - Powers of directors - Appointment of provisional liquidator - Whether directors retain residuary power to instruct Counsel - Whether directors may still instruct Counsel to oppose winding-up petition or order*

The respondent ('the petitioner') had earlier filed a petition for, *inter alia*, the appointment of a provisional liquidator in respect of the appellant ('the company') under s. 231 of the Companies Act 1965 ('the Act'). The trial Judge allowed the petitioner's application and the company applied for a stay of execution in respect of the powers and duties of the provisional liquidator pending its appeal. The trial Judge refused the company's application for a stay and the company applied to the instant Court for the same. It was the company's contention that its appeal would become nugatory if the provisional liquidator was allowed to sell off the only asset which justified the company's existence in the business.

At the hearing of the company's application for a stay before the instant Court, the petitioner took a preliminary objection, i.e., that the company's application for a stay was not properly filed before the Court and, hence, should be dismissed - as the directors of the company had ceased to have any capacity to instruct their solicitors to make the application (for a stay) once the provisional liquidator had been appointed. It was submitted that by virtue of s. 226(3) of the Act, the company could appeal against the order of the trial Judge appointing the provisional liquidator but could not apply for a stay of execution because the provisional liquidator had taken over.

Held:
Per Mahadev Shankar JCA:

[1] Section 226(3) of the Act applies only to proceedings **against** a company. In the instant case, it was the company itself which made the application for a stay of execution. It was the company itself which was appealing against the order appointing the provisional liquidator. Consequently, the petitioner's preliminary objection which was grounded on s. 226(3) of the Act was devoid of merit.

[2] Notwithstanding the appointment of a provisional liquidator and the general assumption by him of a company's powers, the board of directors still retains certain residuary powers which include the authority to instruct solicitors and Counsel to oppose a petition and, if a winding-up order has been made, to appeal against the order.

[Petitioner's preliminary objection dismissed; company's application for a stay allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG SYARIKAT: *Penggulungan - Penyelesai Sementara - Dilantik oleh Mahkamah - Rayuan oleh syarikat terhadap perlantikan penyelesai sementara - Permohonan oleh syarikat untuk menggantungkan kuasa-kuasa dan tugas-tugas penyelesai sementara sementara menantikan rayuan - Samada permohonan untuk penggantungan di hadapan Mahkamah menurut aturan selepas perlantikan penyelesai sementara - Akta Syarikat 1965 s. 226(3)*

UNDANG-UNDANG SYARIKAT: *Pengarah-pengarah - Kuasa-kuasa pengarah - Perlantikan penyelesai sementara - Samada pengarah-pengarah mengekalkan kuasa bakian untuk mengarahkan peguam - Samada pengarah-pengarah masih boleh mengarahkan peguam untuk menentang petisyen penggulungan atau perintah*

Responden ('pempetisyen') telah terdahulunya memfailkan satu petisyen untuk, antara lainnya, perlantikan penyelesai sementara berkaitan dengan perayu ('syarikat') di bawah s. 231 Akta Syarikat 1965 ('Akta'). Hakim perbicaraan telah membenarkan permohonan pempetisyen dan syarikat telah memohon untuk mendapatkan satu penggantungan perlaksaanaan berhubung dengan kuasa-kuasa serta tugas-tugas penyelesai sementara, sementara menantikan rayuannya. Hakim perbicaraan telah menolak permohonan syarikat untuk satu penggantungan dan syarikat telah memohon kepada Mahkamah semasa bagi

perkara yang sama. Ianya merupakan penegasan syarikat bahawa rayuannya akan menjadi nugatori jika penyelesai sementara dibenarkan untuk menjual satu-satunya aset yang mewajarkan kewujudan syarikat tersebut dalam perniagaan itu.

Di perbicaraan permohonan syarikat untuk satu penggantungan di hadapan Mahkamah semasa, pempetisyen telah membuat satu bantahan awal, iaitu, permohonan syarikat untuk satu penggantungan telah tidak difailkan menurut aturan di hadapan Mahkamah dan, dengan itu, seharusnya ditolak oleh kerana pengarah-pengarah syarikat tersebut tidak lagi mempunyai apa-apa kedudukan untuk mengarah peguamcara mereka untuk membuat permohonan itu (bagi mendapatkan satu penggantungan) sebaik sahaja penyelesai sementara dilantik. Adalah dihujahkan bahawa menurut s. 226(3) Akta, syarikat boleh merayu terhadap perintah Hakim perbicaraan yang melantik penyelesai sementara tetapi tidak dapat memohon untuk mendapatkan suatu penggantung perlaksanaan kerana penyelesai sementara telah mengambil alih.

Diputuskan:
Oleh Mahadev Shankar HMR

[1] Seksyen 226(3) Akta terpakai hanya kepada prosiding terhadap sebuah syarikat. Dalam kes semasa ini, syarikat itu sendiri telah membuat permohonan untuk satu penggantungan pelaksanaan. Syarikat itu sendiri telah merayu terhadap perintah melantik penyelesai sementara. Akibatnya, bantahan awal pempetisyen yang telah ditolak atas dasar s. 226(3) Akta adalah tidak bermerit.

[2] Meskipun adanya perlantikan penyelesai sementara dan pengambilalihan secara umum oleh beliau akan kuasa-kuasa sesebuah syarikat, lembaga pengarah masih mengekalkan beberapa kuasa-kuasa bakian yang mana termasuk kuasa untuk mengarahkan peguamcara dan peguam untuk membantah sesuatu petisyen dan, jika sesuatu perintah penggulungan telah dibuat, untuk merayu terhadap perintah itu.

[Bantahan awal pempetisyen ditolak; permohonan oleh syarikat untuk satu penggantungan dibenarkan.]

Cases referred to:
Yamamori (Hong Kong) Ltd. v. Borneo Hotel Sdn. Bhd. & Anor. [1991] 3 CLJ 2238 ***(dist)***
Sri Hartamas Development Sdn. Bhd. v. MBF Finance Bhd. [1991] 3 CLJ 2078 ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 226(3), 231

Other source referred to:
Australian Company Law, para. 372/11

[Appeal from High Court Malaya, Kuala Lumpur; Companies Winding-up No: S5-22-490-94]

For the appellant - Gan Teik Chee; M/s. Gan Teik Chee & Ho
For the respondent - Liow Si Khoon; M/s. Liow & Co.

JUDGMENT

Mahadev Shankar JCA:

On 8 June 1995 Mokhtar Sidin in the exercise of his original jurisdiction appointed provisional liquidators of the respondent company ('the company') under s. 231 of the Companies Act 1965 ('the Act'). The company applied to this Court for an order that the powers and duties of the provisional liquidators be stayed until final disposal of its appeal. We granted the application. Our reasons now follow.

The company has its registered office in Penang. It was incorporated in 1989 with an authorised and paid up capital of RM25,000. 12,750 shares are held by Goh Boon Kim ('the petitioner'), Goh Siew Geok and Quah Cheow Khoon. 14,500 shares are held by Pulau Bintang Holdings Sdn. Bhd. ('PB'), Pulau Bintang Credit Sdn. Bhd. and Chan Guan Hwa. Initially the directors of the company were:

(i) Lim Chee Sin @ Lim Ah Ba;

(ii) Chan Guan Hwa;

(iii) Lim Lai Huat;

(iv) Goh Boon Kim; and

(v) Goh Siew Geok.

The primary object of the company was to build and sell houses. Shortly after incorporation the company borrowed RM360,000 from PB and RM240,000 from Goh. With the RM600,000 the company bought Lot 202, Mukim 13 NED, Taman Sungai Dua, Penang (Lot 202).

According to the petitioner, Lim Chee Sin was a director and shareholder in:

(i) Pulau Bintang Holdings Sdn. Bhd.

(ii) Pulau Bintang Credit Sdn. Bhd.

(iii) Upchem Resources Sdn. Bhd.

(iv) Upchem Development Sdn. Bhd. ('Upchem').

Upchem owned a piece of land (Lot 1705) about 5 km away from Lot 202. Between 1990 and 1994 Upchem had almost completed the development of Lot 1705 by putting up flats thereon.

Lot 202 in the meantime had remained stagnant except for the dilution of its liquid assets by way of a monthly payment of RM500 from the company to Upchem for management fees. By early 1993 the board had divided into two factions with Lim Chee Sin, Chan Guan Hwa and Lim Lai Huat in one camp, and the Petitioner Goh Boon Kim, Goh Siew Geok and Quah Cheow Khoon on the other.

Their differences arose *inter alia* out of:

(i) A demand by PB in February 1993 that the loan of RM360,000 plus interest be repaid.

(ii) An EGM convened for 6 April 1993 to pass a resolution to raise funds to repay the loan of RM600,000 taken to buy Lot 202.

(iii) The drain of RM500 per month from the company to Upchem with no apparent benefit.

Alleging that the affairs of the company were being conducted in a manner oppressive to them, Goh Siew Geok and Quah Cheow Khoon filed a Winding-Up Petition No. 28-2-93 in the Penang High Court. By reason of their alliance we may infer that this petition was also filed for the benefit of Goh Boon Kim. Goh Siew Geok and Quah Cheow Khoon managed to get an *ex parts* injunction on 5 April 1993 to prevent the EGM from proceeding on 6 April 1993. However the injunction was subsequently set aside and the petition was struck out.

Thereafter on 22 July 1994 Lim Chee Sin's remuneration as director of the company was raised to RM5,000 per month. Then at a meeting of the company held on 19 August 1994 Goh Siew Geok was removed as a director. On 12 September 1994 the board removed the petitioner as a signatory to the company's cheques. Notice was then given of an EGM to be held on 8 October 1994 to increase the authorised capital from RM25,000 to RM1.5 million and also for another RM900,000 by way of redeemable convertible unsecured loan stock.

This move which PB and Lim Chee Sin may have viewed as a necessity to raise the required finance to get the company going, was viewed by Goh as evidence of an ultimate act of oppression calculated to exclude his group from

the company. Goh therefore filed this petition on 26 September 1994 (not in Penang where the company has its registered office and its only asset i.e. Lot 202) but in the Kuala Lumpur High Court!

Mr. Gan Teik Chee of Counsel has informed us from the Bar table that the company immediately applied for the petition to be transferred to the Penang High Court. The learned Judge refused. No doubt his reasons for doing so will be ventilated in the appeal which is pending.

The prayers in the petition are that the company be restrained from increasing its capital, and that a provisional liquidator be appointed pursuant to s. 231 of the Companies Act, to take custody of its assets, arrange for a valuation of Lot 202, have it sold by public auction, use the proceeds to pay off the expenses and fees incurred, the loan of RM600,000 taken by the company and thereafter have the company wound-up.

The subsequent cause papers filed in this petition are not before us but from the order of the trial Judge made on 8 June 1995 it is evident that on the basis of the affidavits filed for and against the petition, the trial Judge on a summons in chambers dated 23 March 1995 made an order granting the petitioner all the relief claimed for, short of ordering that the company be wound up.

On its face, this was an interlocutory order made before a proper trial of the issues. In actual fact, it was a final order because it would have resulted in the sale of Lot 202 and thus the disappearance of the substratum of the company. Since the provisional liquidators were required to apply to the Court to have the company wound-up only after they had sold and distributed the assets of the company, there would have been nothing left to wind-up except a formal order to sanction a *fait accompli.*

Immediately after the order was made the company applied for a stay of execution pending appeal. It was refused. A notice of appeal was then filed and a formal application was made to the trial Judge for a stay. It was again refused on 12 July 1995. Then the company applied to us for a stay. The main ground was that the appeal would be nugatory if the provisional liquidators were allowed to sell off the only asset which justified the company's existence as a housing developer.

Since we did not have the judgment of the learned trial Judge before us, we do not know why he did not transfer this petition to Penang when he was asked to or why on an interlocutory application he granted the petitioner all the relief he claimed on contested affidavits without a trial. These matters will be dealt with when the appeal proper is heard and there is no need for us to say any more about that now.

Shortly after the company's solicitors filed the application to us for stay, they served an office copy of the application on the petitioner's solicitors. This was followed up with service of a sealed copy when that become available. All the special reasons required to support an application for stay are contained in the supporting affidavit. These papers were also served on the provisional liquidators.

But before us on the day of hearing the provisional liquidators were absent. The petitioner had not filed any affidavit in opposition to the application either. Instead his Counsel decided to stake his entire resistance on one point taken by way of a preliminary objection.

This was that the directors of the company ceased to have any capacity to instruct solicitors to make this application once the provisional liquidators were appointed. Therefore it was submitted that the application was not properly filed before the Court and should be dismissed. Mr. Liow Si Khoon, Counsel for the petitioner, submitted that although the company could appeal against the order dated 8 June 1995, it could not apply for a stay because the provisional liquidators had taken over. He would not concede that the greater must include the less.

His submission was grounded in s. 226(3) of the Companies Act 1965. It reads:

> 226. (3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except,
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> (a) by leave of the Court; and
>
> (b) in accordance with such terms as the Court imposes.

With respect, this section only applies to proceedings against the company. Here it was the company itself which was making the application Mr. Liow relied very heavily on *Yamamori (Hong Kong) Ltd. v. Borneo Hotel Sdn. Bhd. & Anor.* [1991] 3 CLJ 2238 and especially the passages at 2243 which reads:

> Mr. Davidson, for 1st defendant, associated himself with the remarks and arguments of Mr. Abraham but added that the real issue was whether the directors had any powers to instruct Counsel. Such should be treated under agency law and the internal management of the company which matters should be governed by Hong Kong laws. The being so, Mr. Davidson was of the opinion that the powers of the plaintiff had ceased and that the provisional liquidator had withdrawn the authority of the solicitors. Mr. Davidson informed the Court that Bradley's affidavit at para. 5 was founded on the judgment in *Re-Union Accident Insurance Co. Ltd.* [1972] 1 All ER 1105.

In this case the directors in question were not appealing in the name of the company against a winding-up order or against the appointment of the provisional liquidator. This distinction is crucial if one is to understand the limitations of this authority. What the solicitors in Sabah were doing on the instructions of the directors of Yamamori was to issue a writ in the name of Yamamori for a declaration that certain charges it created in favour of the Borneo Hotel Sdn. Bhd. were invalid. It is important to bear in mind that after the proceedings had been filed the provisional liquidator had been appointed in Hong Kong over Yamamori. The provisional liquidator refused to support the Sabah solicitors for costs. A Mr. Bradley, a Hong Kong solicitor, filed a deposition in these terms:

> The authority of the directors of the company would, under Hong Kong law, be terminated. It would follow that in Hong Kong law the authority of the company's directors to deal with assets of the company abroad and to exercise any authority on behalf of the company abroad would be terminated.

The difference in our case is that the company itself is appealing against the order appointing the provisional liquidators. We agree with Encik Gan Teik Chee of Counsel for the company that the better authority is *Sri Hartamas Development Sdn. Bhd. v. MBF Finance Bhd.* [1991] 3 CLJ 2078 (at p. 2080; [1991] 3 MLJ 324 by which we are bound. At p. 326 YAA Hashim Yeop A. Sani, CJ (Malaya) said:

> In *Re Union Accident Co. Ltd*, it was held, *inter alia*, that notwithstanding the appointment of the provisional liquidator and the general assumption by him of the company's powers, **the board still retained certain residuary powers which included authority to instruct solicitors and Counsel to oppose the petition** and, if a winding-up order is made, to appeal against the order. In that case it was also held that the power to instruct solicitors and Counsel is not the power which any one could suggest has passed to the provisional liquidator. At p. 1113, Plowman J said:
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> > The issue is to the extent of those residuary powers, and in particular whether they extend to the lauching of the present motion. I think that it may sometimes be helpful to test the matter by considering the other side of the coin, namely to enquire whether the power which the board is said to have lost is one which can be said to have been assumed by the liquidator. If the answer is that it cannot, that may be a good reason for saying that the board still retains it. Clearly, for example, as I have already indicated, the power to instruct solicitors and Counsel on the hearing of the winding-up petition is not a power which anyone could suggest has passed to the provisional liquidator and therefore the board retains it. If that is true in regard to the petition itself it is, in my judgment, equally

> true of interlocutory proceedings which are such that it would not be appropriate for the provisional liquidator to give instructions on behalf of the company.

Plowman J's decision found support in the Supreme Court of Victoria, Australia (where our Companies Act 1965 came from) in *Brinds Ltd. & Ors. v. Offshore Oil NL & Ors.* where in the judgment of that Court the following passage appears:

> During the argument, I raised the question whether the applicant, Brinds Ltd, having been in liquidation since December 1983 and throughout apparently insolvent, had any *locus standi* to make, itself this application for a stay, as distinct from on the one hand, such an application made by or with the consent of the liquidator and, on the other hand, a different application by others under s. 383 of the Code.
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> Since then, the researches of Nicholson J have discovered that ingenious Counsel in 1879 raised the question and put the negative answer to the Court of Appeal in England in *Re Diamond Fuel Co.* [1879] 13 Ch D 400 - see especially pp. 404-405. Nearly 100 years later in *Re Union Accident Insurance Co. Ltd.* [1972] 1 All ER 1105 at pp. 1112-113, Plowman J suggested what I think are substantial reasons for an affirmative answer and, in any event, I think this Court should proceed on the footing that the directors of Brinds Ltd have power to bring the present application in the name of the company. See also *McPherson's Company Law* (2nd Edn.) p. 394 *et seq.*

Re Diamond Fuel Company is also authority for the proposition that, despite the fact a liquidator had been appointed, a residual power of appeal remains vested in the directors.

After a winding-up order is made, generally speaking no one but the liquidator can act on behalf of the company. But it is quite clear that the company has a right to be heard to say that the winding-up order is wrong and to appeal against the order. In our case it is expressly provided in s. 253(2) of the Act. The only question is who should move the appeal on behalf of the company.

In the present case the winding-up order had not yet been made and there is a short passage in *Australian Company Law* - para. 372/11 which reads:

> **All the powers of the directors shall cease**
>
> [372/11] A reference to the powers of directors was made in *Re Standhill Consolidated Ltd.* [1967] VR 749 at 753-754. An issue as to the extent of any residuary powers in directors after the appointment of a liquidator arose in *Re Union Accident Insurance Co. Ltd.* [1972] 1 All ER 1105; [1972] 1 WLR 640 where at 1113 and 642 respectively, Plowman J said, "It is of course well-settled that on a winding up the board of directors of a company becomes *junctus officio*

and its powers are assumed by the liquidator, and my attention was drawn to *Re Mawcon Ltd.* [1969] 1 All ER 188 at 192; [1969] 1 WLR 78 at 82, where Pennycuick J state in effect that the appointment of a provisional liquidator had the same result. No doubt that is so, but it is common ground that nowithstanding the appointment of a provisional liquidator the board has some residuary powers, for example it can unquestionably instruct solicitors and Counsel to oppose the current petition and, if a winding up order is made, to appeal against that order.

Notwithstanding appointment of a provisional liquidator, the directors retained power to have the company represented in the winding up proceedings: *Re Laverton Nickel NL* [1979] 3 ACLR 945.

In the face of such authorities we considered the preliminary objection devoid of merit and dismissed it with costs. Mr. Liow then applied for an adjournment to file an affidavit to argue on whether there were special reasons. We refused this application because it had come too late in the day. So we came to the substantive application on which Mr. Liow had nothing to say since he had provided no factual basis for any oppositions We therefore allowed the amended application of the company with costs to be taxed and paid by the petitioner to the company.

Reported by Gan Peng Chiang
& Harjit Singh Pannu